

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1480 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

UNITED COMMERCIAL BANK

Versus

LALITABEN JIVARAMBHAI

Appearance:

MR JR NANAVATI for Petitioner
NOTICE SERVED for Respondent No. 1&2.
MR RA MISHRA for Respondent No. 3

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 01/12/2000

ORAL JUDGEMENT

1. This appeal is preferred by the original defendant no.1 of Special Civil Suit No. 40 of 1978 and has challenged the judgment and decree dated 31.3.1979 passed by the learned Civil Judge, Senior Division,

Rajkot whereby the learned judge was pleased to decree the suit filed by the respondents no. 1 and 2 for Rs. 21,287.69 with interest at the rate of 6% p.a. from the date of the suit till the date of payment on the principal amount of Rs. 15000/-. The plaintiffs' suit against the defendant no.2 is ordered to be dismissed.

2. The facts of the plaintiffs' case, briefly stated, are as under:

The plaintiffs invested Rs. 8000/- and Rs. 7000/-, in all Rs. 15000/- for earning interest in the bank at Rajkot, appellant- defendant no.1 and the defendant no.1 issued two F.D.Rs in favour of the plaintiffs bearing no.230624 dated 15.3.1970 and 30683 dated 4.3.1968 respectively.

The defendant no.2 Shivkumar Jivram Vyas, a sole proprietor of Rasshala Aushadhashram, Gondal had requested bank- defendant no.1 to advance loan against hypothecation of Viking station wagon of defendant no.2. On accepting the request of defendant no.2, the defendant no.1 advanced a loan of Rs. 21,881/- to the defendant no.2. In the said transaction, the defendant no.2 executed demand pronote dated 11.4.1970 in favour of defendant no.1-bank. In the said transaction, the present respondents no. 1 and 2 (original plaintiffs) and one Ghanshyam Vaidya stood surety and guarantor for defendant no.2 and in security of their guarantee, the plaintiffs delivered to defendant no.1 bank, two suit FDRs on 11.4.1970.

It is further the case of the plaintiffs that the defendant no.1 bank had got fresh document dated 7.4.1973 executed by defendant no.2 in respect of the loan advanced by the defendant no.1 bank to defendant no.2 behind the back and without the knowledge or concurrence of plaintiffs guarantors and defendant no.1 bank thereby got the period of limitation extended in respect of the loan transaction between the defendant no.1 and 2. It is the case of the plaintiffs that they did not execute any fresh document or letter of guarantee in favour of the defendant no.1 on 7.4.1973. In the circumstances, as defendants no. 1 and 2 had entered into fresh and/or renewed agreement on 7.4.1973, it superseded previous guarantor agreement executed by the plaintiffs guarantors on 11.4.1970 and thereby the present plaintiffs had stood discharged as guarantors from 7.4.1973 onwards. The plaintiffs, by letter dated 6.8.1973 to the defendant no.1 bank requested to renew FDR of Rs. 8000/- in the name of the plaintiff no.2 alone. It appears that

thereafter the plaintiffs no. 1 and 2 and Ghanshyam J.Vyas, all the three guarantors received notice from the defendant no.1 bank dated 15.7.1974 calling upon them to pay the amount of loan with interest advanced by defendant no.1 bank to the defendant no.2. In reply to the said notice on 19.7.1974, they contended and informed the defendant no.1 that the guarantee of plaintiffs and Ghanshyam Vyas had come to an end and that the claim against the plaintiffs and Ghanshyam as guarantors was barred by the period of limitation in respect of the loan advanced by defendant no.1 to defendant no.2. The plaintiffs in fact called upon defendant no.1 bank to return back the fixed deposit receipts. The plaintiffs again by notice dated 2.11.1974 addressed to the defendant no.1 bank requested to return the amount of two FDRs. Thereafter, the defendant no.1 bank filed a suit being Special Civil Suit No. 34 of 1975 in the Court of Civil Judge, Senior Division, Rajkot for recovery of Rs. 21,278.41 against the original debtor- defendant no.2 and the present plaintiffs as guarantors. The third guarantor Ghanshyam Vyas was not sued or joined as defendant in the said suit. The present plaintiffs, in the said suit, in their written statement Ex. 12 repeated their contention that their guarantee had come to an end and that the claim against them was barred by the period of limitation. In the said suit, on 19.7.1977, the defendant no.1 bank submitted pursis by declaring that it did not wish to proceed further against plaintiffs guarantors i.e. defendants no. 2 and 3 in the said Civil Suit No. 34 of 1975. In the said pursis, the advocate for the present plaintiffs (original defendants no. 2 and 3 of Civil Suit No.34 of 1975) endorsed that :

"There is no objection to withdrawal of the suit
subject to costs and subject to the right to
recover F.D.R. amount with interest from
plaintiff."

The learned judge also passed an order below pursis to the effect that:

"Heard the parties' advocates. Defendants no. 2
and 3 are deleted as prayed for. No order as to
costs."

The defendant no.1 bank compromised the said Civil Suit No. 34 of 1975 with original debtor, the present defendant no.2 and submitted compromise in the suit granting time for payment of original loan amount. Even in the said compromise, the advocate for the present

plaintiffs, advocate for the defendants no. 2 and 3 of previous Civil Suit No. 34 of 1975, made an endorsement as under:-

"I object to this compromise as the plaintiffs have no right to adjust F.D.R.amount."

It is, therefore, contended by the plaintiffs in the present suit that the plaintiffs were not the consenting parties to the compromise made by defendants no.1 and 2 in previous suit and, therefore, by virtue of section 135 of the Indian Contract Act, guarantee of the present plaintiffs has come to an end and plaintiffs were discharged as guarantors by virtue of the provisions of law. It is further the contention of the plaintiffs that as the previous suit against the plaintiffs as guarantors having been withdrawn and plaintiffs having been deleted as defendants in the previous suit and as no decree is passed against the present plaintiffs in the previous suit, it amounts to dismissal of previous suit against the plaintiffs. The plaintiffs, in the circumstances, are entitled to return of F.D.R. amount of Rs. 15000/along with interest up to the date of the suit from the defendant no.1 bank as guarantee executed by plaintiffs was not submitted at all. Therefore, the bank has no right to appropriate or to adjust two F.D.Rs towards the dues payable by the defendant no.2 to defendant no.1 of the original loan transaction between them. The plaintiffs, therefore, filed the present suit to recover the amount of two F.D.Rs along with interest of Rs. 21,287.69 against the defendant no.1 without prejudice to the claim preferred against the defendant no.1 bank.

The plaintiffs, in the alternative, claimed that in case the Court comes to the conclusion that the plaintiffs are not entitled to any amount from defendant no.1 bank, the plaintiffs prayed for a decree of Rs. 21,287.69 against the original debtor, the defendant no.2 as he is under legal obligation to indemnify the present plaintiffs who stood guarantors for him.

3. The defendant no.1 bank in the written statement Ex. 16, while denying the claim made by the plaintiffs, asserted that the plaintiffs have not stood discharged as guarantors of defendant no.2. It was denied that the defendant no.1 bank has no right to appropriate or adjust the amount of two FDRs towards the dues payable by defendant no.2 to the defendant no.1 up to the date of the suit. Therefore, it was contended that the plaintiffs are not entitled to recover the amount of two FDRs along with interest already appropriated and

adjusted by the defendant no.1 towards the debt due from the plaintiffs guarantors and original debtor i.e. defendant no.2.

4. The defendant no.2, in his written statement Ex. 13 also denied the averments made in the plaint. While admitting that the compromise between defendants no. 1 and 2 was made in the previous suit no. 34 of 1975, it was contended that now the plaintiffs have no remedy to get decree against the defendant no.2 for indemnifying the guarantors and, therefore, the suit of the plaintiffs against the defendant no.2 is bad in law and the plaintiffs are not entitled to recover any amount from the defendant no.2.

5. The learned trial judge, on the basis of the pleadings, raised issues at Ex. 21. The parties have not led any oral evidence. After appreciating the documentary evidence on record, the learned trial judge decided the suit in favour of the plaintiffs by directing the defendant no.1 bank to pay Rs. 21,297.69 to the plaintiffs. Hence the present appeal.

6. Mr.J.R.Nanavati, learned Counsel for the appellant submitted that the trial court, by misreading the documentary evidence on record, has erred in holding that the plaintiffs stood discharged from the liability as sureties and also as guarantors. In the submission of Mr. Nanavati, in view of Ex. 32 and 33, the appellant bank was entitled to appropriate or adjust the amount of two FDRs of Rs. 15000/- along with interest towards the dues against the defendant no.2.

7. On perusal of the documents on record, the following facts emerge:

It is not in dispute that the defendant no.1 bank advanced loan of Rs. 21000/- and odd to the defendant no.2 on 11.4.1970. In the said transaction, the plaintiffs and one Ghanshyam Vyas stood sureties and guarantors for defendant no.2. It is not in dispute that in the said transaction, the plaintiffs as guarantors handed over the two FDRs of Rs. 8000/- and Rs. 7000/to defendant no.1 bank. But thereafter the accounts of suit loan transaction were settled which can be seen from Ex. 28, the copy of the previous suit no. 34 of 1975. The defendant no.1 bank and original debtor i.e. defendant no.2, on 7.4.1973, executed fresh document in respect of the loan advanced by defendant no.1 bank to defendant no.2 and the defendant no.2 original debtor had passed fresh pronote and other hypothecation deed in favour of

defendant no.1 bank on 7.4.1973. This is clear from the notice served by the defendant no.1 bank to the present plaintiffs and the original debtor, the defendant no.2 and third guarantor Ghanshyam Vyas. As stated above, the plaintiffs and Ghanshyam Vyas stood guarantors and sureties for the defendant no.2 by executing Letter of Guarantee in favour of defendant no.1 on 11.4.1970. The said account was settled between the defendant no.1 bank and the defendant no.2 at Rs. 16577.02 on 7.4.1973. On 7.4.1973, when fresh pronote and hypothecation deed was obtained by defendant no.1 bank from the defendant no.2, there is no evidence to show that this adjustment was with the consent or concurrence of the present plaintiffs guarantors and Ghanshyam Vyas, the third guarantor. Similarly, there is no evidence to show that the present plaintiffs and Ghanshyam Vyas had passed fresh guarantee letter in favour of defendant no.1 bank on 7.4.1973. In view of this, it is clear that the account was settled and adjusted between the defendant no.1 bank and the defendant no.2 on 7.4.1973 at Rs. 16577.02. It further transpires that the original debtor i.e. defendant no.2 did not pay back the loan amount advanced to him by the defendant no.1 bank with interest of Rs. 16577.02 and, therefore, the defendant no.1 bank served notice dated 15.7.1974 to the original debtor i.e. defendant no.2, present plaintiffs and Ghanshyam Vyas vide Ex. 22. Vide Ex. 23, the said notice was replied on 19.7.1974 wherein they informed the defendant no.1 bank that as the defendant no.1 bank had settled accounts of previous loan with the original debtor i.e. defendant no.2 on 7.4.1973 and as the defendant no.1 bank had obtained fresh pronote and new agreement of hypothecation beyond their knowledge and without their concurrence, their liability as guarantors for original transaction dated 11.4.1970 had come to an end and they stood discharged as guarantors and sureties. In the circumstances, the present plaintiffs and Ghanshyam Vyas stood discharged as guarantors of original debtor i.e. defendant no.2. It is not in dispute that the defendant no.1 had not replied to Ex. 23 dated 19.7.1974 denying the fact that they stood discharged as guarantors. Not only that, the present plaintiffs and Ghanshyam Vyas served a notice to defendant no.1 bank on 2.11.1974 vide Ex. 25 informing the bank to return the FDRs as they had already stood discharged as guarantors in pursuance to the guarantee submitted by them in the year 1970 which was not substituted after expiry of three years from the date of original transaction. In any case, the said notice Ex. 25 also reveals the fact that the defendant no.1 bank had obtained fresh pronote and new agreement of hypothecation from original debtor on 7.4.1973 without concurrence and

consent of the present plaintiffs and such act between the defendant no.1 and 2 was prejudicial to them and their guarantee had ceased and not subsisting from 7.4.1973 onwards. The plaintiffs, therefore, had called upon the defendant no.1 bank to return the FDR of Rs. 8000/-and Rs. 7000/-. True, the defendant no.1 bank repudiated the claim of the plaintiffs in their reply dated 7.11.1974. Since the original debtor i.e. defendant no.2 did not settle the accounts along with interest of Rs. 16577.02, the defendant no.1 bank filed suit being Civil Suit No.34 of 1975 against the original debtor, defendant no.2 and the present plaintiffs as guarantors without joining Ghanshyam Vyas, the third guarantor. During the pendency of the said suit, the present plaintiffs no.1 and 2 were deleted by the defendant no.1. Thus, it is clear that the defendant no.1 bank had withdrawn the suit against the present plaintiffs by making a compromise with the defendant no.2, the original debtor as per the compromise Ex. 39 and the copy of the decree of previous suit Ex. 40. As no decree was passed against the present plaintiffs as guarantors in the previous suit, the plaintiffs served a notice of the suit claim on 31.8.1977 calling upon the defendant no.1 to return the FDRs i.e. to pay the amount of FDRs along with interest. The said notice was replied by the defendant no.1 at Ex. 31. In para 7 of the plaint of the present suit, the plaintiffs averred that the defendant no.1 had not sued their guarantor Ghanshyam Vyas in the previous suit because the guarantee had come to an end which was accepted by the bank. In para 6 of the written statement Ex. 16, the defendant no.1 has admitted that the contents of para 7 of the plaint are correct. In view of this admission on the part of the defendant no.1, it is clear that the defendant no.1 bank had not sued Ghanshyam Vyas, the third guarantor in the previous suit as he had stood discharged from the surety and guarantee as his guarantee had come to an end.

8. As stated above, there is no dispute to the fact that the plaintiffs and Ghanshyam Vyas, the third guarantor were the guarantors and if Ghanshyam Vyas was not sued in the previous suit, the present plaintiffs are also discharged from guarantee from original loan transaction between the defendants no. 1 and 2. Moreover, the defendant no.1, as stated above, obtained new pronote and new hypothecation agreement executed from defendant no.2 without consent and concurrence of the plaintiffs. The plaintiffs had not executed fresh letter of guarantee in favour of defendant no.1 bank. i.e. original guarantee letter was not renewed on 7.4.1973. In view of the fact that on 7.4.1973, fresh pronote and

fresh hypothecation agreement was executed by defendant no.2 in favour of defendant no.1 without the concurrence of the plaintiffs, the same is prejudicial to the interest of the plaintiffs guarantors as it relates to the period of limitation. In view of this, I am clearly of the opinion that the plaintiffs guarantors stood discharged by virtue of section 135 of the Indian Contract Act from 7.4.1973 and/ or from the date of expiry of three years from the date of original transaction i.e. 11.4.1970. In the circumstances, it is held that the plaintiffs have proved that they stood discharged as guarantors and sureties for defendant no.2 in respect of the original transaction between the defendants no. 1 and 2.

9. In view of the above, I am also of the opinion that the defendant no.1 bank had no right to recover dues payable by defendant no.2 by appropriating FDRs of Rs. 15000/- of the present plaintiffs. In the circumstances, the plaintiffs are entitled to recover the suit amount of two FDRs of Rs. 15000/- from the defendant no.1 bank. In my opinion, the learned trial judge was perfectly justified in decreeing the suit in favour of the plaintiffs.

10. There being no merits in this appeal, it is dismissed. No order as to costs.

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